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Supreme Court, U.S.
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No. 01-394

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

WARREN CHRISTOPHER, MARILYN MCAFEE, ALEXANDER WATSON, ANNE PATTERSON, PEG WILLINGHAM, ANTHONY LAKE, and RICHARD E. FEINBERG,

Petitioners,

v.

JENNIFER K. HARBURY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether allegations that senior State Department and National Security Council officials withheld information and intentionally misled a private citizen about a foreign rebel leader in the captivity of a foreign government state a violation of the constitutional right of access to the courts, when the only claim is that defendants' speech was intentionally misleading and there are no allegations that the plaintiff ever tried to file a lawsuit and was actually hindered in that effort?

2. If the Court concludes that a constitutional violation is properly grounded on allegations such as these, whether government officials violate clearly established law whenever they allegedly mislead a private citizen or conceal information and it is later claimed that they intended to and did hinder the filing of a hypothetical lawsuit?

PARTIES TO THE PROCEEDING

The petitioners in this case all are or were officials with the Department of State or the National Security Council. The Department of State petitioners are Warren Christopher (former Secretary of State), Marilyn McAfee (former Ambassador to Guatemala), Alexander Watson (as Assistant Secretary for InterAmerican Affairs), Anne Patterson (as Deputy Assistant Secretary of InterAmerican Affairs), and Peg Willingham (as Guatemala Desk Officer). The National Security Council petitioners are Anthony Lake (former National Security Advisor and head of the National Security Council) and Richard E. Feinberg (as a staff member of the National Security Council). Petitioners are defendants in this case and were the appellees in the court below. Also named as defendants in this case were three former directors of the Central Intelligence Agency (John M. Deutch, R. James Woolsey, and Robert M. Gates); fourteen officials and employees of the Central Intelligence Agency (David Cohen, John J. DeVine, Hugh E. Price, Thomas A. Twetten, John C. Gannon, Douglas J. MacEachin, John L. Helgerson, Terry R. Ward, Brian Latelle, Richard N. Cooper, Christine N. Williams, Joseph S. Nye, Fritz W. Esmarth, Dan Donahue, and Frederick A. Brugger), unnamed employees of the Department of State, National Security Council, and Central Intelligence Agency; the Department of State, National Security Council, and Central Intelligence Agency; and the United States of America (which was substituted as a party for purposes of the tort claims asserted originally against the named defendants). All of the petitioners are individuals or government entities, and thus there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

Jennifer K. Harbury is the plaintiff in this case on her own behalf and as administratrix of the Estate of Efrain Bamaca-Velasquez, and she was the appellant in the court below.

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Petitioners,

v.

JENNIFER K. HARBURY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF FOR PETITIONERS

INTRODUCTION

The court below held that a substantive due process right of access to the courts is triggered whenever government officials are alleged to have concealed information or misled private citizens, and at least one of their motivations was to avoid or forestall a lawsuit. This Court's few decisions in this area have never recognized any such sweeping constitutional right, and they should not be so extended in this case. Respondent's due process rights were not violated because she was never denied access to the courts. Moreover, even if the Court were to embrace this new due process right, respondent would not be authorized to pursue it by means of a *Bivens*

action. Finally, if the Court were to decide to allow parties in respondent's position henceforth to raise the novel constitutional right urged upon the Court here, then it should also uphold petitioners' defense of qualified immunity, based on the circumstances of this case and the uncertain state of the prevailing decisional law at the time they acted.

OPINIONS BELOW

The opinion of the Court of Appeals for the D.C. Circuit is reported as *Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2000), and is reprinted in the appendix to the petition for certiorari ("Pet. App.") at 1a-29a. That opinion reversed an order and opinion of the district court, which granted petitioners' motion to dismiss and upheld their defense of qualified immunity. The district court's unreported opinion is reprinted at Pet. App. 30a-57a. The court of appeals denied a timely petition for rehearing, reported as *Harbury v. Deutch*, 244 F.3d 956 (D.C. Cir. 2001), and reprinted at Pet. App. 61a-68a. The court of appeals also denied a suggestion of rehearing *en banc*, with two judges dissenting, reported as *Harbury v. Deutch*, 244 F.3d 960 (D.C. Cir. 2001), and reprinted at Pet. App. 69a-71a.

STATEMENT OF JURISDICTION

The court of appeals denied a timely petition for rehearing on April 6, 2001. Pet. App. 61a. The Court extended the time for seeking certiorari to September 3, 2001. *See id.* at 72a-73a. The petition for certiorari was filed on September 1, 2001 and was granted on December 10, 2001. *See* J.A. 67. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. V.

STATEMENT OF THE CASE

A. The Allegations in the Complaint.

Respondent filed suit in 1996 against the Department of State, National Security Council (NSC), Central Intelligence Agency (CIA), and numerous officials and employees from each agency in both their individual and official capacities. *See* J.A. 1-2. The individuals named in her lawsuit include former Secretary of State Warren Christopher, former NSC head Anthony Lake, and former Ambassador to Guatemala Marilyn McAfee. Respondent asserted a variety of claims under state and federal law, including tort claims under the Federal Tort Claims Act (for which the United States of America has been substituted as a party), as well as constitutional claims for declaratory and injunctive relief, among which was a claim that she was denied her right of access to the courts under the First and Fifth Amendments. *See id.* at 19-64. Respondent also sued the named individuals for damages based on her constitutional claims under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Defendants moved to dismiss on grounds of both failure to state a claim as a matter of law and qualified immunity. *See* J.A. 65-66; Pet. App. 7a.

In her Second Amended Complaint, respondent made the following factual allegations, which the courts have assumed to be true at this juncture. She is an American citizen and is the widow of Efrain Bamaca-Velasquez, a Guatemalan citizen and high-ranking commander of a Guatemalan rebel group, who vanished on March 12, 1992. *See* Pet. App. 2a, 30a; J.A. 23. Although the Guatemalan army declared that Bamaca had committed suicide during an armed skirmish and that it had buried his body, this was false. *See id.* at 26-27; Pet. App. 3a. Instead, Bamaca had been captured and detained by members of

the Guatemalan military, among whom were paid CIA informants. *See id.*; J.A. 27-28. The CIA allegedly was aware that Bamaca was being held by the Guatemalan army and that its paid agents would be involved in torturing him to obtain information, pursuant to Agency policies and practices of long standing. *See id.*; Pet. App. 5a.

The Complaint further alleged that early in 1993, respondent learned from an escaped prisoner that her husband was alive and being tortured. In March of 1993, she contacted several State Department officials, told them what she had learned, and asked for information about her husband. *See* Pet. App. 3a; J.A. 29-30. The officials promised to look into the matter and to assist her, but never provided her with any information. In August of 1993, she obtained permission to open Bamaca's grave and discovered that the body was not his. She immediately informed petitioner McAfee, who said she would investigate the matter and keep respondent informed, but did not provide her with any information thereafter. *See id.* at 30-31; Pet. App. 3a.

Based on respondent's allegations, Bamaca appears to have been executed sometime between March and September of 1993. *See* J.A. 27-31. Over the next year, between October 1993 to October 1994, respondent met repeatedly with State Department officials, who assured her they were looking into the matter and told her the Guatemalan military had advised them that it did not have (and had never had) custody of Bamaca. *See id.* at 32; Pet. App. 3a-4a. In October of 1994, the CBS news program *60 Minutes* reported that the U.S. Embassy in Guatemala had an intelligence report stating that Bamaca had been captured alive. In response, the State Department publicly confirmed his capture, stating that he had been lightly wounded and was held prisoner for some time, and that it had no information confirming that he was still alive. *See id.* at 4a; J.A. 34. The following month, respondent met with petitioner Lake, head of the NSC, who told her the government had "scraped the bottom of the barrel" for information about her husband, that no further information existed, and that he and

other officials would keep looking and keep her informed. *See id.*; Pet. App. 4a.

Respondent suspected that the State Department and NSC officials were withholding information and so in January of 1995 she filed a request under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). *See* J.A. 34; Pet. App. 4a. The proceedings were expedited, but she did not receive any documents in the following months. *See* J.A. 35. Since that time, however, she has filed two lawsuits in federal court to press her FOIA requests, and after receiving thousands of pages of documents, she has voluntarily dismissed both actions. *See Harbury v. CIA*, No. 95-CV-1431 (D.D.C. filed July 31, 1995; stipulation of dismissal filed Jan. 28, 1999); *Harbury v. Department of State, et al.*, No. 97-CV-305 (D.D.C. filed Feb. 14, 1997; stipulation of dismissal filed Jan. 28, 1999).

In March of 1995, respondent commenced a hunger strike (her third) in front of the White House.[1] State Department and NSC officials had met with respondent just days before, and had told her that they believed Bamaca to be dead because so much time had passed with no evidence that he was still alive. *See* J.A. 35. A few days later, Congressman Bob Torricelli announced publicly that the murder of Bamaca had been ordered in 1992 by a Guatemalan army officer who was also a paid informant for the CIA. *See id.* at 36. Petitioners are alleged to have intentionally misled her and concealed information in an effort to conceal their role and the government's role in Bamaca's death, pursuant to the CIA's customary policies and practices. *See id.* at 36-37.

In the Second Amended Complaint, respondent raised a variety of tort claims, including intentional infliction of

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[1] In fact, this was respondent's third hunger strike; she had engaged in a week-long hunger strike in Guatemala City in September of 1993, and in another "highly publicized thirty-two day hunger strike" in Guatemala City in October of 1994, which had engaged the attention of the news media, including Mike Wallace, a reporter from the much-watched *60 Minutes* television program. *See* J.A. 31-36.

emotional distress, negligent supervision, and wrongful death, as well as a claim for alleged violations of international law. *See* J.A. 54-62. She also raised three constitutional claims, including a claim that petitioners violated her constitutional right of access to the courts by misrepresenting and concealing information about her husband's fate that prevented her from "effectively petitioning the appropriate government authorities, and from effectively seeking to publicize her husband's plight through the media." *Id.* at 53.

B. The District Court Proceedings.

Defendants moved to dismiss all of respondents' claims. After full briefing, the district court (Kollar-Kotelly, J.) issued a detailed opinion that granted the motion to dismiss in part and dismissed respondent's constitutional claims, leaving her tort claims to proceed under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671-80 (FTCA). *See* Pet. App. 30a-57a.

The court began by holding that defendants were not entitled to sovereign immunity on respondent's official capacity claims, since constitutional claims are a recognized exception to that defense. *See* Pet. App. 31a-32a. Nonetheless, it went on to apply *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), to hold that respondent lacked standing to press those claims for declaratory and injunctive relief. *See id.* at 32a-34a.

The district court then addressed the *Bivens* claims asserted against defendants in their individual capacities. The court concluded that each of respondent's constitutional claims was insufficient as a matter of law and, in the alternative, that defendants were entitled to qualified immunity. *See* Pet. App. 35a-55a.

In particular, the district court rejected respondent's claim that petitioners had infringed her constitutional right of access to the courts. The court concluded that this right protects more than mere physical access to the courts, but held, consistent with the decisions of several courts of appeals, that the claim "required the plaintiff to have already attempted to gain access to state-court remedies before bringing a constitutional denial-

of-access claim." Pet. App. 45a (citing cases). It quoted with approval the Sixth Circuit's observation that "[b]efore filing an 'access to courts' claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact 'effective' and 'meaningful'?" *Swekel v. City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997) (quoted at Pet. App. 46a). Since respondent had never taken this necessary step, her "suspicion that the alleged cover-up may have prejudiced her rights to bring a separate action is nothing more than a guess," *id.*, and her claim was insufficient as a matter of law.

Recognizing that dismissal without prejudice still would permit respondent later to refile her claim, the district court proceeded to consider the qualified immunity issue. It held that petitioners were entitled to qualified immunity because, at the time they acted, the cases recognizing an access-to-courts claim had all involved much more egregious conduct, whereby defendants had "destroyed evidence, manufactured evidence, or refused to satisfy a duty to investigate." Pet. App. 48a. By contrast, "[n]o such nefarious conduct" was alleged here: "Conspicuously absent from the Second Amended Complaint are allegations that Ambassador McAfee, NSA Lake, or any other State Department or NSC Defendants destroyed evidence, manufactured evidence, or refused to satisfy a duty to investigate." *Id.* Instead, respondent alleged only that petitioners had misled her by assuring her that "the government had no information about Bamaca and [making] allegedly disingenuous overtures to assist her." *Id.* In addition, given the sensitive subject matter, which touched on delicate matters of relations with a foreign government, the court stated it could not conclude that petitioners "would have reasonably known that they [had to] be forthcoming in discussing the intelligence that they had received about Bamaca." *Id.* Therefore they were entitled to qualified immunity on the access-to-courts claim.

Pursuant to Federal Rule of Civil Procedure 54(b), the district court certified its dismissal of respondent's *Bivens* claims as final, *see* Pet. App. 59a, and respondent appealed. While the appeal has proceeded, the district court has continued to move

forward on respondent's tort claims. Some of those claims were dismissed as a matter of law, but respondent's claims for negligent supervision and intentional infliction of emotional distress have been allowed to proceed. The parties are currently in discovery on those tort claims. *See* J.A. 10-14.

C. The Decision by the Court of Appeals.

The court of appeals (Edwards, Ginsburg, *Tatel*) affirmed the district court in almost all respects, but reversed and reinstated respondent's claimed violation of her constitutional right of access to the courts. *See* Pet. App. 1a-29a.

On respondent's access-to-courts claim, the court began by stating that the Constitution does confer such a right, which "not only protects the ability to get into court, . . . but also ensures that such access be 'adequate, effective, and meaningful.'" Pet. App. 21a (quoting *Bounds v. Smith*, 430 U.S. 817, 822 (1977)). It then discussed decisions from other circuits suggesting that, as the court of appeals put it, "government cover-ups can infringe the right of access to the courts." Pet. App. 21a. Petitioners argued that these other decisions were inapposite, because all involved instances "where police officers charged with investigating a crime destroy, conceal, or manufacture evidence in violation of statutory duties." *Id.* at 22a-23a. The court rejected this view, finding sufficient respondent's allegations that petitioners intentionally deceived her and that at least one of their motives was to prevent her from bringing suit. The court held that "regardless of whether State and NSC officials had an affirmative duty to provide information to [her] in the first place, the complaint states a clear case of denial of access to courts." *Id.* at 23a.

The court of appeals also rejected the principal basis for the district court's contrary decision – that respondent had never tried to file a lawsuit and thus had not been denied access to the courts. It recognized the apparent inconsistency of its decision with decisions by the Sixth and Ninth Circuits, which had rejected access-to-courts claims where plaintiffs had not yet completed prosecuting their tort claims and thus could not yet establish that their state court remedies had been rendered

ineffective. *See* Pet. App. 23a-24a (discussing *Swekel*, 119 F.3d at 1264, and *Delew v. Wagner*, 143 F.3d 1219, 1222-23 (9th Cir. 1998)). The court based its decision on the possibility that petitioners' alleged misstatements might have impaired respondent's ability to pursue effective injunctive relief, rather than to bring suit. Respondent's claim, the court explained, was that had she known all the true facts, she might have been able to take some action to save her husband's life, such as "'seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's true plight through the media.'" Pet. App. 24a (quoting Complaint, J.A. 37). The court noted that during oral argument respondent had elaborated that she might have sought "an emergency injunction based on an underlying tort claim for intentional infliction of emotional distress" or filed her FOIA requests sooner. *Id.* Because respondent had thus identified some possibility of irreparable harm from petitioners' conduct, the court of appeals held that the "exhaustion" requirement imposed by other courts was not applicable to her claims. *See id.* at 25a. And even though respondent could have decided to file a lawsuit or her FOIA requests at any time (and in fact did promptly file and vigorously pursue relief under FOIA), the court found that because of petitioners' alleged concealments she may not have known enough to do so. *See id.* at 24a-26a.

With respect to qualified immunity, the court of appeals rejected the district court's conclusion that the unlawfulness of petitioners' conduct would not have been apparent from extant case law. The district court had reasoned that the prior cases, unlike the instant case, had involved "allegations of 'nefarious conduct,' such as manufacturing false evidence or destroying or refusing to collect evidence," and that petitioners, unlike the defendants in those prior cases, were under no statutory obligation to investigate the matter. Pet. App. 26a. Instead, the court of appeals held that qualified immunity was inappropriate because respondent had generally alleged that she had been "affirmatively misled" by petitioners and that at least one of their purposes in doing so was to "prevent[] her from filing a lawsuit." *Id.* at 27a. The court did not specify the decisions

prior to 1993 that had clearly established the unlawfulness of such conduct, and did not identify any controlling decisions on this point. Instead, it purported to "[join] our sister circuits" by simply proclaiming that "we think it should be obvious to public officials that they may not affirmatively mislead citizens for the purpose of protecting themselves from suit." *Id.* at 28a.

A timely petition for rehearing and suggestion for rehearing *en banc* was denied, *see* Pet. App. at 61a-71a, with Judges Henderson and Sentelle dissenting. Judge Henderson's dissent agreed with the district court that respondent "suffered no constitutional deprivation or, alternatively, if she did, the individual defendants are entitled to qualified immunity from liability therefor." *Id.* at 70a. Because respondent had not identified "any effective relief" that had been foreclosed by petitioners' alleged misstatements and nondisclosures, she could not establish that their conduct was "a substantial cause of [her] failure to obtain judicial relief," which would be a necessary component of her right-of-access claim. *Id.* (quotation omitted). Moreover, the extant precedents were so sparse and distant from respondent's allegations that petitioners would not have been "on notice that such very different conduct might violate [respondent's] right of access to the courts." *Id.* at 71a.

The panel commented further in response to the dissent. First, the panel expressly noted that its holding did in fact extend the law beyond "the general requirement that prior to bringing a claim for deprivation of access to courts based on an alleged cover-up, plaintiff must first press her underlying claims to ensure that the alleged cover-up in fact prejudiced her ability to seek relief." Pet. App. 62a. Nonetheless, it contended that this extension was justified because respondent had alleged that petitioners' conduct "completely foreclosed" her ability to obtain a specific form of relief in a hypothetical lawsuit – injunctive relief based on a tort claim for intentional infliction of emotional distress – that could perhaps have saved her husband's life. *Id.* It also suggested that the opinion was narrow in scope, being limited to situations where "defendants both affirmatively mislead plaintiffs and do so for the very purpose of protecting government officials from suit," including

efforts to protect either themselves or other officials. *Id.* Finally, with respect to qualified immunity, the panel reiterated that cases from other circuits involving thé fabrication of evidence, though factually distinct, were still sufficiently specific or pertinent to put petitioners on notice that their alleged conduct here would violate "clearly established" constitutional rights (though many of the cases cited postdated the conduct at issue here). *See id.* at 66a-67a.

Petitioners are the State Department and NSC officials who were sued in their individual capacity on the access-to-courts claim. Their timely petition for certiorari was granted on December 10, 2001. *See* J.A. 67.

SUMMARY OF ARGUMENT

The constitutional right of access to the courts is implicated only where government officials actually deny individuals access to the courts. Accordingly, this doctrine has been properly limited to instances where the government has erected some institutional bar to invoking ordinary legal processes or officials have imposed arbitrary restrictions on the ability of persons in government custody to access the legal system. Both situations are rooted in the Court's precedents, but neither is applicable here. As a general matter, private citizens are free to institute litigation at any time or to invoke other legal processes that are fully available to them. The Due Process Clause is not implicated merely because they are dissatisfied about their discussions with public officials or believe they have been deprived of accurate, useful, and timely information, where adequate avenues of redress remain open to them. This view accords with the Court's frequent warnings against the crafting of expansive new substantive due process rights, especially where, as here, doing so would tread on highly sensitive matters affecting the conduct of foreign policy.

Moreover, to assert a violation of the right of access, complaining parties must show that they have at least tried to bring suit in order to establish that the defendant has in fact caused them to be denied access to the judicial process. Here, respondent has merely asserted that she could have brought

various hypothetical claims or sought more desirable remedies. In fact, respondent has filed various tort claims against petitioners here, some of which remain pending in the trial court. The court below wrongly dispensed with this exhaustion requirement in any situation where plaintiffs can allege some potential source of irreparable harm entitling them to a particular form of relief. Because other remedies and processes are available to citizens in this situation, it would be inappropriate to supplant them by fashioning such a far-reaching constitutional right here. Indeed, given the novelty of respondent's constitutional claim, along with various "special factors" that are present here, it is improper for the federal courts to allow her to pursue a *Bivens* action at all.

Finally, petitioners are entitled to qualified immunity. Even if they are now adjudged to have violated respondent's constitutional right of access to the courts, no such right was clearly established at the time they acted. None of the Court's decisions even hints at such a broad rule, and the extant case law in the lower courts was (and remains) inconsistent in addressing this issue. Because the unlawfulness of petitioners' conduct was far from apparent in light of preexisting law and the distinctive concerns raised by the context of this case, the district court correctly upheld their defense of qualified immunity.

ARGUMENT

The Court has held that in qualified immunity cases, courts "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *see also Saucier v. Katz*, 121 S. Ct. 2151, 2155-56 (2001); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Accordingly, petitioners will address the two issues under review in the order specified: (1) Does respondent state a valid claim based on the right of access to the courts in this *Bivens* action? (2) If so, was this right "clearly established" in 1993 and 1994 so as to defeat petitioners' defense of qualified immunity? The decision below cannot be sustained on either point.

I. RESPONDENT DOES NOT STATE A VALID CLAIM BASED ON THE RIGHT OF ACCESS TO THE COURTS IN THIS *BIVENS* ACTION.

A. Respondent's Substantive Due Process Claim Finds No Support in the Court's Precedents.

The right-of-access claim asserted in this case goes far beyond the Court's precedents. Respondent contends that this substantive due process right has been recognized by the Court's decisions for more than a century and flows naturally from cases such as *Bounds v. Smith*, 430 U.S. 817 (1977). But a careful review of the relevant precedents reveals that they lend scant support for respondent's aggressive new due process claim.

The Court has discussed a constitutional right of access to the courts in only a few cases, which fall into two narrow categories: they involve *either* institutional mechanisms that directly preclude access to the courts, *see, e.g.*, *Chambers v. Baltimore & O.R.R.*, 207 U.S. 142, 147-50 (1907); *Boddie v. Connecticut*, 401 U.S. 371, 374-83 (1977), *or* arbitrary restrictions on judicial access for prisoners held in government custody, *see, e.g.*, *Bounds*, 430 U.S. at 821-33; *Johnson v. Avery*, 393 U.S. 483, 485-90 (1969). Both categories involve methods of literally barring potential litigants from accessing the legal system to assert their lawful claims.[2]

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[2] In addition to the Due Process Clause of the Fifth Amendment, respondent has also pleaded her right-of-access claim under the First Amendment. *See* J.A. 49-51. The Court has occasionally stated that individuals enjoy associational rights under the First Amendment that safeguard their ability to join into groups for purposes of pursuing litigation. *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (extending *Noerr-Pennington* antitrust exemption to combinations for invoking judicial and administrative processes); *NAACP v. Button*, 371 U.S. 415, 429-30 (1963) (nullifying state ban on associations soliciting and funding individuals in litigation). Yet the Court has held since that where parties allege that "they have been denied 'meaningful access to the courts' to present

In the first category, the Court has stated its disapproval of institutional mechanisms that systematically bar access to the courts. For example, the claim at issue in *Chambers* – which the Court rejected – was that the Ohio courts were improperly discriminating against citizens from other States by denying them the right to pursue wrongful death actions on the same terms as Ohio citizens. *See* 207 U.S. at 146-48. It was in this setting that the Court described the right of access to the courts as "one of the highest and most essential privileges of citizenship, [which] must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens." *Id.* at 148; *see also id.* (stating in *dicta* that the "right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government."). Ultimately the Court found the alleged discrimination to be illusory and upheld the challenged law. *See id.* at 149-51.

Soon thereafter, the Court established that the Due Process Clause did not invalidate established procedural preconditions that had to be satisfied before filing certain types of civil suits. *See, e.g.*, *Jones v. Union Guano Co.*, 264 U.S. 171, 180-81 (1924) (requirement that plaintiff must first obtain chemical analysis of fertilizer before bringing product suit against fertilizer manufacturer judged to be "reasonable" in rejecting due process challenge). In a later case, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), the Court likewise upheld a requirement that a plaintiff must post security as a precondition to bringing a shareholder derivative action, concluding that the government "may set the terms on which it will permit

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their claims," their "First Amendment arguments, at base, are really inseparable from their due process claims" and consequently their "First Amendment claim has no independent significance." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985). *Cf. Shaw v. Murphy*, 121 S. Ct. 1475, 1478-79 & n.3 (2001) (rejecting First Amendment claims in context of legal assistance for prisoners). To the extent that respondent is pressing the argument, therefore, the First Amendment appears to add nothing to the legal analysis here.

litigations in its courts," as long as they are "reasonable." *Id.* at 552.

Another set of cases in this line concerns prospective litigants who are barred from the courts because of their inability to pay the required filing fees. In several cases, the Court has invalidated such restrictions under an analysis that relies on both the Due Process Clause and the Equal Protection Clause. *See Boddie v. Connecticut*, 401 U.S. 371, 374-83 (1977) (individuals cannot be denied access to courts to dissolve their marriage based on inability to pay required costs); *Burns v. Ohio*, 360 U.S. 252, 256-58 (1959) (individuals cannot be denied appellate review based on inability to pay filing fee); *Griffin v. Illinois*, 351 U.S. 12, 16-20 (1956) (Black, J.) (plurality opinion) (individuals cannot be denied appellate review in criminal cases based on inability to pay for transcript). In subsequent cases, however, the Court refused to extend these precedents to civil suits generally, *see Ortwein v. Schwab*, 410 U.S. 656 (1973) (per curiam); *United States v. Kras*, 409 U.S. 434 (1973), and recently the Court explained that the *Boddie* principle extends only to "a narrow category of civil cases," *i.e.*, those "involving state controls or intrusions on family relationships." *M.L.B. v. S.L.J.*, 519 U.S. 102, 113, 116 (1996).

It is apparent that none of these decisions has anything to do with the matter at hand. In this case, there is no institutional bar to suit by respondent. Instead, her allegation is merely that she was impeded in seeking injunctive relief because petitioners either concealed information or misled her about what they knew concerning her husband's fate in Guatemala. *See* Pet. App. 21a-25a; J.A. 49-51. This allegation, however, does not involve a denial of "access" to the courts. Moreover, in these circumstances, where petitioners are not alleged to have been under any legal duty to disclose whatever information they might have had, it is totally unclear as a constitutional matter what "process" respondent claims to have been "due" under the law.

The second narrow category of right-of-access decisions holds that the Due Process Clause prohibits arbitrary restrictions

on the right of access to the courts for detained prisoners. In *Ex parte Hull*, 312 U.S. 546 (1941), for example, the Court invalidated a state prison regulation that conferred unlimited discretion upon a designated functionary to prevent prisoners from filing petitions for habeas corpus unless they were deemed to be "properly drawn." *Id.* at 548-49. The Court tersely concluded that "[w]hether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine." *Id.* at 549.

In *Johnson v. Avery*, 393 U.S. 483 (1969), the Court struck down a state prison regulation that barred prisoners from advising or assisting one another in preparing legal papers where no other assistance was available to them. Once again, the Court rested its decision on the importance of habeas corpus as a mechanism for prisoners to challenge the legality of their incarceration: "Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Id.* at 485; *see also Procunier v. Martinez*, 416 U.S. 396, 419-22 (1974) (invalidating similar restrictions on inmate interviews with law students or paralegals). In *Wolff v. McDonnell*, 418 U.S. 539 (1974), this holding was extended to civil rights actions, since "the demarcation line between civil rights actions and habeas petitions is not always clear" and both are employed to vindicate prisoners' constitutional rights. *Id.* at 579.

This line of decisions reached its apex in *Bounds*, in which the Court stated that "prisoners have a constitutional right of access to the courts" that must be "adequate, effective, and meaningful." 430 U.S. at 821-22. In *Bounds* itself, the Court construed this directive as requiring prison officials "to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828. *Bounds* is the central precedent that respondent has invoked in this case.

The Court's more recent precedents in this area have refused to expand the scope of the due process right recognized in *Bounds*. *See, e.g., Lewis v. Casey*, 518 U.S. 343 (1996) (overturning broad injunctive relief premised on alleged *Bounds* violations); *Thornburgh v. Abbott*, 490 U.S. 401, 409-12 (1989) (stating more permissive test for evaluating restrictions on prisoners). In *Lewis*, in particular, the Court expressly repudiated any "suggest[ion] that the State must enable the prisoner to *discover grievances*, and to *litigate effectively* once in court." 518 U.S. at 354 (emphasis in original). As the Court stated: "These elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases, and we now disclaim them." *Id.* The Court also clarified that prisoners' right of access to the courts applies only to limited types of claims: those that "attack their sentences, directly or collaterally," or "challenge the conditions of their confinement." *Id.* at 355; *see also id.* at 365 (Thomas, J., concurring) (expressing doubts about the validity of *Bounds* and "of a loosely defined 'right of access to the courts'").

In the end, this line of decisions offers no support for the due process claim that respondent asserts in this case. As an initial matter, the prisoner cases are distinct because in the "substantive due process analysis, it is the State's affirmative act of restraining the individual's right to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 200 (1989); *see also Youngberg v. Romeo*, 457 U.S. 307, 315-17 (1982). No such denial of liberty has occurred here, and therefore cases such as *Bounds* are inapposite.

Indeed, the Fifth Circuit has expressed apt skepticism about applying precedents like *Bounds* in this very different setting:

> In the world of litigation outside prison walls, these cases are of little assistance. Unlike prisoners, ordinary individuals do not find any physical barriers between them and the courts. To file a complaint or

> legal paper, they need merely travel to the courthouse or even just the nearest mailbox; to get legal advice, they need only travel to a lawyer's office or the nearest law library, or pick up the telephone.

Crowder v. Sinyard, 884 F.2d 804, 811-12 (5th Cir. 1989), *cert. denied*, 496 U.S. 924 (1990).

In the wake of *Lewis*, it is now clear that the Constitution does not require government officials to take affirmative steps to enable prisoners who are in their custody to "discover grievances" and "to litigate effectively," even though their confinement substantially hampers their litigating capacity as "one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." 518 U.S. at 354-55 (emphasis omitted). Clearly, then, public officials are under no similar duty to take such steps on behalf of private citizens who enjoy continual and unfettered access to the federal and state court systems to file civil claims. Yet the court of appeals imposed just such a requirement in this case, upholding a right-of-access claim based merely on allegations that petitioners' statements impaired respondent in her ability "to litigate effectively" by leaving her with imperfect knowledge and dampened motivation to pursue an injunctive remedy.[3]

Moreover, the breadth of the ruling below ignores the Court's explicit reluctance to expand substantive due process

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[3] The decision below to uphold respondent's right-of-access claim, which alleges that she was "foreclosed from effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's true plight through the media," J.A. 37, is highly ironic in light of her vigorous efforts in each category: (1) this lawsuit, which continues to proceed, as well as two other federal-court actions to enforce her rights under the FOIA to receive extensive government documents, *see supra* page 5; (2) her numerous and repeated meetings with petitioners and other high-ranking federal officials, J.A. 29-35; and (3) her three hunger strikes, the last of which was "highly publicized," and all of which generated extensive media coverage, *id.* at 31-36.

rights. *See, e.g.*, *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process, because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("We must therefore exercise the utmost care whenever we are asked to break new ground in this field" and thereby "place the matter outside the arena of public debate and legislative action") (quotation omitted); *Troxel v. Granville*, 530 U.S. 57, 76 (2000) (Souter, J., concurring) (cautioning against "turning any fresh furrows in the treacherous field of substantive due process") (quotation omitted).

There are obvious reasons to heed the Court's admonitions here, as the same sort of claim brought by respondent in this case would, if elevated to the level of a constitutional guarantee, apply to a wide range of essential government conduct. For example, sting operations and undercover investigations rely on deceptive statements; indeed, misleading the suspect *is the whole point* of such operations. Yet under the ruling below, a due process violation would arise whenever law enforcement officials mislead an individual who suffers imprisonment or death or some other irreparable harm as a result – *i.e.*, whenever the operation is successful – and he can allege that he might have invoked some legal process to avert this harm. Such results would be quite out of harmony with the Court's precedents. *See, e.g.*, *Jacobson v. United States*, 503 U.S. 540, 548 (1992) ("Artifice and strategem may be employed to catch those engaged in criminal enterprises.") (quotation omitted); *United States v. Russell*, 411 U.S. 423, 434 (1973) ("stealth and strategy are necessary weapons in the arsenal of the police officer") (quotation omitted).[4]

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[4] It is widely recognized that the exigencies of law enforcement at times will justify, if not commend, the practice of misleading or even lying to criminal suspects. *See, e.g.*, *Illinois v. Perkins*, 496 U.S. 292, 297 (1990) ("*Miranda* forbids coercion, not mere strategic deception" or "[p]loys to mislead a suspect"). It is settled law that such conduct

Similar cases are easy to envision. In a great variety of contexts, officials may be moved, for entirely legitimate reasons (or even somewhat illegitimate ones, based on momentary lapses of judgment), to deflect inquiries by withholding information or even suggesting, falsely, the absence of responsive information. To take just a few hypothetical examples: a federal prosecutor who finesses an inquiry about suspected criminal conduct in order to safeguard confidentiality and the presumption of innocence; a White House press officer who gives a cagy or misleading response about military activity so as not to harm ongoing operations; a Federal Reserve Board official who withholds information about contemplated regulatory action so as not to destabilize the economy; or a FOIA clerk who falsely suggests that a request will receive a prompt response even though he knows there is already a large backlog of requests. Under the ruling below, such situations would present potential constitutional violations and the discouraging prospect of personal liability.

It is not satisfactory to seek to dismiss these scenarios based on the suggestion that those government actors may be acting out of "legitimate" motives, rather than trying to insulate themselves from suit. For under the elastic standard asserted by respondent and accepted by the court below, a plaintiff need allege only that avoiding suit was "*one* of [the defendants']

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is constitutional even in the context of custodial interrogations, as long as it has not "overborne the will" of the suspect. *See, e.g.*, *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (no constitutional violation, and confession held voluntary where police falsely told defendant that his accomplice had confessed) *Ledbetter v. Edwards*, 35 F.3d 1062, 1066-70 (6th Cir. 1994); (defendant falsely told police matched his fingerprints to those found at scene and two witnesses identified him); *United States v. Palmer*, 203 F.3d 55, 59-62 (1st Cir. 2000) (defendant falsely told his accomplice was a child molester). The difficulties that would readily flow from respondent's substantive due process claim will not be lost on police officers, who under the ruling below could be held personally liable for pursuing confessions through entirely constitutional means.

express objectives." Pet. App. 23a (emphasis added). Moreover, as the court of appeals stressed in denying rehearing, on a motion to dismiss "*any* ambiguities or doubts concerning the sufficiency of the claim must be resolved in favor of the pleader." Pet. App. 63a (emphasis in original; quotation omitted). When the mixed-motive standard embraced by the court of appeals is combined with the permissive pleading rules that govern motions to dismiss, few if any *Bivens* defendants will be able to escape the demands of enduring a lawsuit. At that preliminary stage, bare allegations about the defendant's mental state are virtually unrebuttable where the plaintiff mixes into the complaint some alloy of illegitimate motive.[5]

In addition, in the circumstances of this case, respondent's claim of a due process violation is even more tenuous. To begin with, even indulging all inferences as is appropriate at this threshold stage, respondent's underlying factual allegations are extremely thin: she claims only that before her husband died she had contacted petitioners, who promised to look into the matter but never provided her with any information. *See supra* pages 4-5; J.A. 29-31. It is questionable whether those allegations alone can support any legitimate inference of untruth or wrongdoing. In fact, respondent's allegations about improper motivation are exactly the kind of bare assertions that could be offered in every case. In addition, the "disinformation" allegedly offered by petitioners to discourage a lawsuit might also, or primarily, have been provided to achieve other objectives, such as preserving the secrecy of government deliberations, of sensitive activities, or even of covert operations.

Indeed, it is generally acknowledged that "[s]pecial operations, by their nature, are cloaked in secrecy and deception, making it impossible to know whether the officials who discuss them obliquely are being completely candid."

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[5] This state of affairs would also destroy the important benefits that are conferred by the defense of qualified immunity, which is an "*immunity from suit* rather than a mere defense to liability," and which is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original).

David E. Sanger & Steven Lee Myers, *President Says U.S. Is "in Hot Pursuit" of Terror Group*, N.Y. TIMES, Sept. 29, 2001, at A1. Given the many considerations surrounding this work, it would be unrealistic and unwise to require officials rigidly to confine themselves solely to an empty "Glomar" response of refusing to comment. Under the ruling below, any attempt by officials to exercise judgment in finessing or deflecting such inquiries could readily be characterized as a misleading statement or material omission giving rise to a claimed constitutional violation. *See* Pet. App. 23a. In fact, it is notable that even discouraging a lawsuit *itself*, with its attendant disclosures and publicity, may be vital to achieving these other objectives by preserving the secrecy of sensitive government matters.

The court below suggested that these kinds of concerns are misplaced because petitioners remain free to plead a "national security" defense. Pet. App. 62a. Yet this extraordinary method of pleading should be – and has been – confined to the rarest and most exigent cases, since it rests on the premise that concerns about the national interest can be invoked to defeat the accepted judicial functions. *See Totten v. United States*, 92 U.S. 105, 107 (1876) (action involving matters of state secret cannot be maintained and must be dismissed without judicial examination). As Chief Justice Marshall once said of the doctrine, "[w]hat ought to be done under such circumstances presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country." *The Trial of Aaron Burr*, 1 ROBERTSON'S REPORTS 186. Indeed, as the Court recently stated in a related context, where the matters at issue involve "not merely the disclosure of normal domestic law enforcement priorities and techniques, but often the disclosure of foreign policy objectives and (as in this case) foreign intelligence products and techniques," the "Executive should not have to disclose its 'real' reasons . . . and, even if it did disclose them, a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy." *Reno v. Arab-American Anti-Discrimination Comm.*, 525 U.S. 471, 490-91 (1999). Thus it does not mitigate the unprecedented

nature of respondent's constitutional due process claim to urge the federal trial courts to invite more such constitutional crises.

For all of these reasons, the Court should hold that respondent has not stated a valid claim for violation of the Due Process Clause, thereby rejecting this invitation to veer sharply away from the consistent direction of its existing precedents. *Cf. Albright v. Oliver*, 510 U.S. 266, 271-75 (1994) (rejecting substantive due process claim to be free from prosecution except on the basis of probable cause).

B. The Due Process Clause Was Not Violated Because Respondent Was Never Denied Access to the Courts.

In this case, respondent claims that petitioners violated her due process rights even though she did not first try to file suit in order to establish that she actually was denied access to the courts. Under the standard adopted by other circuit courts, and expressly followed by the district court in this case, respondent's failure to meet this requirement would be dispositive of her due process claim. *Compare* Pet. App. 46a & n.2 *with id.* at 23a-24a. By dispensing with any such requirement, the court below misapplied the proper constitutional analysis and dramatically expanded the scope of this substantive due process right.

In *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997), for instance, the Sixth Circuit held that even where the plaintiff alleges "reprehensible" actions by government officials to cover up evidence in order to ward off a lawsuit, which "substantially prejudice [her] ability to recover in state court," such actions would not "amount[] to a constitutional violation" unless she can "show absolute denial from state court." *Swekel*, 119 F.3d at 1264. As the court explained its view of the need for such an "exhaustion" requirement:

> [Plaintiff,] however, never presented evidence that the state court could not adequately address these problems. In fact, none of the evidence before this court establishes that Swekel even attempted to go to the state court in the first instance. Before filing an

> "access to courts" claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact "effective" and "meaningful"?

Id. The court therefore affirmed dismissal of the access-to-courts claim on the basis that to establish such a claim a plaintiff "cannot merely guess that a state court remedy will be ineffective," but must show that "the defendant's actions actually rendered any state court remedy ineffective." *Id.*

Likewise, in *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998), the Ninth Circuit dismissed a right-of-access claim even where the plaintiffs *had* brought a wrongful death claim in the state courts, but had then filed suit in federal court claiming that their constitutional rights had been violated by law enforcement officers who tried to cover up their own involvement in a shooting. The court held that to present a valid claim, plaintiffs had to show that "the defendants' cover-up violated their right of access to the courts by rendering '*any* available state court remedy ineffective.'" *Id.* at 1222-23 (quoting *Swekel*, 119 F.3d at 1264) (emphasis added). The court concluded that because their "wrongful death action remains pending in state court, it is impossible to determine whether this has in fact occurred." 143 F.3d at 1223.

The court below purported to distinguish these cases, though its purported distinction threatens to expand the scope of this right even further. The gist of the court of appeals' position is that respondent stated a due process violation by alleging that, had she been fully informed about the situation, she could possibly have averted Bamaca's death by bringing a common-law tort claim for intentional infliction of emotional distress and seeking an emergency injunction to save his life before it was too late. On this basis, the court explained, she can plausibly claim that petitioners' alleged misrepresentations and concealments completely foreclosed her from pursuing this particular form of relief. *See* Pet. App. 24a-26a, 63a-64a.

Among other problems, this novel approach conflates two distinct points. By holding that respondent's constitutional

rights were infringed because she was hindered in pursuing a specific remedy, rather than that she was prevented from taking her claims to court, the court below fashioned a much broader constitutional entitlement: no longer is a plaintiff entitled only to exercise a "facilitative" right to *access* the courts, but he or she can now lay claim to secure a particular and most desirable outcome. *Cf. Lewis*, 518 U.S. at 354 (expressly rejecting suggestion that government officials must enable individuals "to *discover grievances*, and to *litigate effectively* once in court") (emphasis in original). As the Fifth Circuit put the matter in rejecting a claimed right of access resting on such broad allegations: "The constitutional right of access does not, however, guarantee one the right to have one's case proceed in a particular procedural posture *or the right to a particular form of relief*." *Crowder*, 884 F.2d at 813-14 (emphasis added).

The court below styled its approach as a "futility" exception, but that was a misnomer, as the conflicting rulings of the Sixth and Ninth Circuits aptly illustrate. *Both* cases require plaintiff to show that the defendant's actions actually rendered "any" state court remedy ineffective. *See Swekel*, 119 F.3d at 1264; *Delew*, 143 F.3d at 1222-23. The court below embraced the view that if *some particular remedy* were rendered ineffective, a valid constitutional claim is raised. The other courts have been far stricter in applying this "exhaustion" requirement – even "reprehensible" actions by government officials to cover up evidence in order to ward off a lawsuit, which "substantially prejudice [her] ability to recover in state court," do not amount to a constitutional violation unless she can "show *absolute denial* from state court." *Swekel*, 119 F.3d at 1264 (emphasis added); *see Delew*, 143 F.3d at 1223 (claim can proceed "if in fact the defendants' alleged cover-up actually rendered *all* state court remedies ineffective") (emphasis added). Accordingly, these courts hold that a plaintiff *must* "make some attempt to gain access to the courts" *before* "filing an 'access to courts' claim." *Swekel*, 119 F.3d at 1264; *Delew*, 143 F.3d at 1222-23. Here respondent failed to do so and thus failed to establish any valid due process claim.

The approach taken by the Sixth and Ninth Circuits represents the better view on this issue and is more consistent with this Court's precedents concerning due process and the right of access. It simply defies logic and analysis to hold as a matter of constitutional law that a claimant can establish a violation of the right of access without showing that she has actually been unable to access the courts.

Indeed, in *Parratt v. Taylor*, 451 U.S. 527 (1981), the Court held that a prisoner did not state a valid due process claim where adequate remedies were available to seek redress in the state courts, though he had not made use of them. The Court noted that this "procedure was in existence at the time of the loss here in question," and though "the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded [in federal court], that does not mean that the state remedies are not adequate to satisfy the requirements of due process," at least where the alleged deprivation did not occur pursuant to any established procedure. *Id.* at 543-44. The Court expressed special concern that any other result "would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the [Due Process Clause]." *Id. See also Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (holding that *Parratt* is applicable to intentional deprivations by government officials); *Lujan v. G&G Fire Sprinklers*, 121 S. Ct. 1446, 1450 (2000) (finding no due process violation where state withholds payment on contract because any such claim for payment "can be fully protected by an ordinary breach-of-contract suit").[6] Nor does respondent fare any better by framing the issue as one of substantive due process, for it is clear that a "mere pleading exercise" cannot be used to avoid the *Parratt* rule "by attaching a substantive, rather

[6] *Cf. Davis v. Passman*, 442 U.S. 228, 245 (1979) (recognizing *Bivens* claim for violation of the Due Process Clause only because "there are available no other alternative forms of judicial relief. For Davis, as for Bivens, 'it is damages or nothing.'") (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)).

than a procedural, label to due process claims." *Albright*, 510 U.S. at 285 (Kennedy, J., concurring).

The *Parratt* line of decisions thus demonstrates a key error in the ruling below: the impairment of one kind of legal remedy does not violate due process where parties remain free to assert their claims and seek other relief, even though they may not view the alternative remedies as optimal. Indeed, the Due Process Clause protects only those "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," and does not otherwise limit inevitable policy choices about the specifics of adequate and appropriate procedures and remedies. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). This essential consideration is fully applicable here, as many alternative remedies may adequately redress the kinds of concerns raised by respondent's right-of-access claims.

Perhaps most important, the venerable doctrine of equitable tolling is typically available in all jurisdictions to preserve the underlying claims from expiration where a party could not reasonably have been expected to have discovered the correct state of affairs, such as where officials are alleged to have concealed material information.[7] In addition, many jurisdictions recognize either a distinct cause of action for intentional spoliation of evidence,[8] or impose liability for such conduct

[7] *See, e.g., Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874) (undisputed doctrine in Anglo-American courts that cause of action is not be deemed to have accrued until fraud is discovered); *Exploration Co. v. United States*, 247 U.S. 435, 449 (1918) (describing "now almost universal" rule that limitations period "shall not begin to run until the discovery of the fraud"). It is worth noting that even if respondent had failed to file suit within a limitations period of general applicability, it is doubtful that due process would be violated. *See, e.g., Albright*, 510 U.S. at 285 (Kennedy, J., concurring); *Daniels v. Williams*, 474 U.S. 327, 342 (1986) (Stevens, J., concurring).

[8] *See, e.g., Holmes v. Amerex Rent-A-Car*, 180 F.3d 294 (D.C. Cir. 1999); *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185 (N.M. 1995); *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993); *Hazen*

under the common law of torts.[9] *See, e.g.*, *Swekel*, 119 F.3d at 1264 (citing availability of such remedies); *id.* at 1265 (Merritt, J., concurring) ("We should not simply displace the normal state court remedies for spoliation or concealment of evidence or obstruction of state judicial proceedings with a new, expanded, loosely worded, federal constitutional tort"); *Foster v. City of Lake Jackson*, 28 F.3d 425, 431 n.9 (5th Cir. 1994) (same); *Ryland v. Shapiro*, 708 F.2d 967, 973 n.7 (5th Cir. 1983) (same). In instances where officials deliberately concealed or falsified evidence, federal officials may be exposed to a traditional *Bivens* claim for violating the Fourth Amendment, *see, e.g.*, *Albright*, 510 U.S. at 271-75 (Rehnquist, C.J.) (plurality opinion), and state and local officials may be subjected to corresponding liability under section 1983 or 1985 for conspiracy to violate civil rights, *see, e.g.*, *Bell v. City of Milwaukee*, 746 F.2d 1205, 1260 & n.69 (7th Cir. 1984). In pending actions, discovery tools and judicial sanctions can be used to redress any alleged misconduct. *See, e.g.*, *National Hockey League v. Metro Hockey Club*, 427 U.S. 639, 643 (1976) (per curiam) ("the most severe in the spectrum of sanctions" for discovery misconduct "must be available to the district court in appropriate cases" in order to punish and deter violations). Litigation that already has been pursued and terminated can be reopened where good reasons exist to justify relief from the operation of the judgment. *See, e.g.*, *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991). Criminal sanctions and penalties for obstruction of justice, tampering with evidence, perjury, or other illegal acts also apply. *See, e.g.*, *Bell*, 746 F.2d

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v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986); *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. App. 1984), *review denied*, 484 So. 2d 7 (Fla. 1986).

[9] *See, e.g.*, *Rosenblit v. Zimmerman*, 766 A.2d 749 (N.J. 2001); *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267 (Ill. 1995); *Weigl v. Quincy Specialties Co.*, 601 N.Y.S.2d 774 (Sup. Ct. 1993); *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434 (Minn. 1990); *La Raia v. Superior Ct.*, 722 P.2d 286 (Ariz. 1986); *Henry v. Deen*, 310 S.E.2d 326 (N.C. 1984).

at 1223; *Ryland*, 708 F.2d at 969 & n.3. Once again, even if a complaining party may not view this array of alternative remedies as optimal, they are nonetheless adequate for constitutional purposes. *See Parratt*, 451 U.S. at 543-44.

Rather than require respondent first to file a lawsuit pressing her underlying claims – as she is actually doing now in this case under the Federal Tort Claims Act – the court of appeals was content to accept legal hypotheticals that border on the fantastic. Having ventured down this uncertain path, the court soon found itself enmeshed in a thicket of surmise. Indeed, respondent's contentions are so dubious that it is not even clear she can meet the minimal threshold for standing to bring suit, which in turn would doom her access-to-courts claim. *See* Pet. App. 47a n.4 ("A cover-up to conceal evidence cannot prejudice a plaintiff's access to courts if the cause of action contemplated is untenable from the outset.").

The Court has repeatedly instructed that the irreducible constitutional minimum of standing comprises three elements:

> (1) that the plaintiff have suffered an "injury in fact" – an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167 (1996). The Court has consistently applied the second and third components to dismiss claims that rest on speculation about the uncertain consequential actions of third parties. *See, e.g.*, *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) (if mother of illegitimate child "were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed

only speculative"); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 43 (1976) (causation and redressability prongs not satisfied where it is "speculative at best" to infer that "hospitals are so financially dependent upon the favorable tax treatment afforded charitable organizations that they would admit respondents if a court required such admission as a condition to receipt of that treatment").

The linchpin of respondent's claim for right of access to the courts was the supposition that but for the alleged concealment or deception, she would have effectively sought judicial action that could have prevented her husband's death. *See* Pet. App. 24a-25a, 64a; J.A. 50-51. Closer examination of this blithe skein of conjecture reveals its extreme tenuousness and illustrates the great potential for mischief in such a broad formulation of the constitutional claim. Embedded in the opinion of the court below is a series of speculations about future events, legal matters, and the conduct of third persons, all of which stretch constitutional standing requirements far past their breaking point.[10]

Indeed, the prospect that judicial action could have saved the life of respondent's husband – which was the key premise of the ruling below – is far more remote than the scenarios rejected in *Simon* and *Linda R.S.* Here respondent claims that if petitioners had promptly disclosed the information they allegedly possessed, she "could have sought an emergency injunction based on an underlying tort claim for intentional infliction of

[10] It is well established that at this threshold stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss, we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quotation omitted). There is a difference, however, between crediting factual allegations – even the most general factual allegations – and indulging in unsupported assumptions about future contingencies, particularly those based in part on ascertainable legal requirements. If there were not, the causation and redressability components of standing would be meaningless.

emotional distress." Pet. App. 24a; *see also id.* at 63a-64a. In uncritically accepting this claim, the court of appeals failed to examine the tortuous relation between her alleged injury – being misinformed about the government's knowledge of Bamaca – and the possibility that an American court would have issued an injunction that would have prevented his death.

Respondent's ill-defined claim would have been brought in federal court under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 (FTCA), or if filed in state court against federal officials would have been removable to federal court, *see* 28 U.S.C. §§ 1442, 2679(d)(2), and the United States would have been substituted for the federal officials as the defending party, *see id.* [11] Once that occurred, to the extent respondent was asserting claims that either involve "a discretionary function" or "arise in a foreign country," they would have been dismissed under sovereign immunity. 28 U.S.C. §§ 2680(a), (k). If her lawsuit had somehow managed to survive these obstacles, then her motion for injunctive relief based only on tort claims (rather than any federal statute or constitutional provision) would itself have been barred by sovereign immunity and principles of federal supremacy. *See, e.g.*, *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (injunctive relief barred where it would "interfere with the public administration" or its effect would be "to restrain the Government from acting, or to compel it to act") (quotations omitted); *Malone v. Bowdin*, 369 U.S. 643, 645-48 (1962) (same); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 692-705 (1949) (same); *cf. Zschernig v. Miller*, 389 U.S. 429, 432-41 (1968) (application

[11] The Attorney General's certification that the United States should be substituted as the defending party turns on a determination that the official "was acting within the scope of his office or employment at the time," 28 U.S.C. § 2679(d)(1), and this decision itself is subject to judicial review. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995). In this case, however, the point would be established by respondent's claims that petitioners were acting pursuant to longstanding government policies and practices in dealing with information about covert activities. *See, e.g.*, J.A. 27-28, 37.

of state probate law held to be invalid intrusion on federal authority over foreign affairs and international relations).

Finally, even if, for some inexplicable reason, a court put all these problems to one side and granted the requested injunction to bar the relevant federal officials from participating in the alleged mistreatment of her husband, it is still highly doubtful whether that judicial order would have prevented the Guatemalan soldiers from killing him. *See, e.g.*, Pet. App. 70a (Henderson, J., dissenting from denial of reh'g) ("No United States court could reach the alleged tortfeasors, Guatemalan nationals on Guatemalan soil, in order to prevent their killing Harbury's husband, another Guatemalan national."); *see also Lujan*, 504 U.S. at 562 (noting standing problems where "one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict'") (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (Kennedy, J.; plurality opinion)). In the end, the extent of speculation at even this one final step is too great to satisfy the causation and redressability prongs of standing doctrine as applied in the Court's prior cases. *See, e.g.*, *Simon*, 426 U.S. at 43; *Linda R.S.*, 410 U.S. at 618.

None of these manifold problems would arise under the more logical and judicious approach taken by those circuits that incorporate an "exhaustion" requirement in their formulation of the due process claim. As noted, the district court adopted the stricter approach endorsed by the Sixth and Ninth Circuits, holding that respondent's claim must be dismissed because she did not allege that she had ever tried to bring an action and been hindered in doing so. *See* Pet. App. 45a-46a & n.2. The court of appeals jettisoned that requirement, and therefore reversed and reinstated her claim. *See id.* at 23a-26a. This was error, especially since respondent's right-of-access claim so plainly relies "on little more than the remote possibility, unsubstantiated by allegations of fact, that [her] situation might have been better had [petitioners] acted otherwise, and might improve were the

court to afford relief." *Warth v. Seldin*, 422 U.S. 490, 507 (1975) (dismissing claims for lack of standing).

As the Court has emphasized, the Due Process Clause simply was never intended to create "a font of [federal] tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976). Although respondent may have various grievances, she simply cannot be said to have been denied "access" to the courts. In this case, in fact, she was never actually barred from the courts; she could have filed one or several lawsuits at any time, she could have pursued her FOIA action sooner, and in this very proceeding she continues to press causes of action for negligent supervision and intentional infliction of emotional distress under the FTCA. *See* J.A. 10-14; *see also supra* pages 7-8. Accordingly, respondent has no valid due process claim.

C. Respondent Has No Cognizable *Bivens* Action.

Earlier this Term, the Court reiterated its longstanding "caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades." *Correctional Servs. Corp. v. Malesko*, 122 S. Ct. 515, 523 (2001). The Court recognized that its "authority to imply a new constitutional tort [is] not expressly authorized by statute," *id.* at 519, and noted it had steadily "retreated from our previous willingness to imply a cause of action where Congress has not provided one" casts doubt on any efforts to expand upon its *Bivens* jurisprudence. *Id.* at 519 n.3; *see also id.* at 524 (Scalia, J., concurring) ("There is even greater reason to abandon [implied causes of action] in the constitutional field, since an 'implication' imagined in the Constitution can presumably not even be repudiated by Congress."); *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) ("Our more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts.").

Here, respondent has asserted her novel substantive due process claim by means of a *Bivens* action. Yet no such cause of action has ever been approved by the Court. The only case in which the Court has upheld a *Bivens* claim based on an

alleged violation of the Due Process Clause is *Davis v. Passman*, 442 U.S. 228 (1979). In that case, however, the context of the claim was quite different: the plaintiff sought to sue the Congressman who had been her former employer under the equal protection component of the Fifth Amendment's Due Process Clause, in order to recover damages based on sexual discrimination. *See id.* at 230-32. There the Court inferred a new right of action "chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation." *Malesko*, 122 S. Ct. at 520; *see also Davis*, 442 U.S. at 230-33 & n.4. Accordingly, the holding in *Bivens* should not be extended to authorize the newfangled cause of action that respondent asserts here. Moreover, in the circumstances of this case respondent does not lack for other remedies and legal and administrative processes, which in fact she continues to pursue. *See supra* Part I.B.

In addition to its general caution in inferring *Bivens* claims, the Court has also instructed on many occasions that a *Bivens* remedy will not be authorized in any case that presents "special factors counseling hesitation in the creation of a new remedy." *Bush v. Lucas*, 462 U.S. 367, 380 (1983); *Chilicky*, 487 U.S. at 423; *FDIC v. Meyer*, 510 U.S. 471, 486 (1994). Here there are no fewer than *three* "special factors" that weigh against authorizing a *Bivens* action as framed by respondent.[12]

First, the Congress has created an elaborate statutory mechanism for seeking information from the federal government, including detailed avenues for obtaining judicial relief and forceful sanctions against government officials who improperly withhold requested information. *See* Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). In both *Bush* and *Chilicky*, the Court held that any such comprehensive regulatory scheme which provides meaningful, even if incomplete, relief for alleged constitutional deprivations precludes the courts from

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[12] Petitioners do not take issue with the Court's holding in *Carlson v. Green*, 446 U.S. 14 (1980), that the existence of the Federal Tort Claims Act itself is not a "special factor" that would justify declining to recognize a *Bivens* action. *See id.* at 19-23.

fashioning an additional *Bivens* remedy. This approach is premised on "appropriate judicial deference to indications that congressional action has not been inadvertent." *Chilicky*, 487 U.S. at 423; *see also id.* at 420-29; *Bush*, 462 U.S. at 374-90. The FOIA is doubtless such a scheme.

The FOIA "is fundamentally designed to inform the public about agency action." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 144 n.10 (1975); *see also Dep't of the Air Force v. Rose*, 425 U.S. 352, 360 (1976) (same). Congress consciously built from the ground up and expressly sought to establish "the basic principle of a public records law by making the records available to any person." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2426. Accordingly, the general rule under the FOIA is that federal agency records are subject to full disclosure, *see* 5 U.S.C. § 552(a)(3), though the Act also recognizes that agencies may often have a legitimate, indeed overriding, justification for withholding information from public scrutiny and provides a list of nine exclusive exemptions for that purpose, *see* § 552(b). These statutory exemptions thus represent a very careful balance struck by Congress "'between the right of the public to know and the need of the Government to keep information in confidence.'" *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. 89-1497, *supra*, at 6); *see also Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982) ("public disclosure is not always in the public interest.").

The FOIA also includes an intricate series of provisions that specify an agency's duty to respond to requests for information, including mandatory deadlines, *see* 5 U.S.C. § 552(a)(6)(A), expedited treatment where appropriate, *see id.* § (a)(6)(E), and a *de novo* judicial review process in which the agency bears the burden to justify nondisclosure, *see id.* § (a)(3). If the requesting parties prevail in court, they can recover attorney fees and other litigation costs. *See id.* § (a)(4)(E). Finally, Congress provided strong disciplinary measures against officials who "acted arbitrarily or capriciously" in withholding information. *Id.* § (a)(4)(F); *see* 5 U.S.C. § 1216(a)(3). This detailed set of rights, remedies, and procedures for addressing

claims that officials are improperly withholding access to information constitutes "an elaborate comprehensive scheme that encompasses substantive provisions forbidding arbitrary action . . . and procedures – administrative and judicial – by which improper action may be redressed." *Bush*, 462 U.S. at 385.[13]

The Court has also made clear that in considering the extraordinary step of creating an additional judicial remedy, it is of no moment that Congress has not provided in the FOIA for every possible manner and mechanism of relief. *See Chilicky*, 487 U.S. at 425 (*Bivens* remedy is not implied where Congress established statutory remedial scheme to handle particular category of disputes with the government, even where alleged constitutional injury would otherwise "go unredressed"); *see also Bush*, 462 U.S. at 378 (stating it is irrelevant to the *Bivens* analysis whether Congress has "expressly den[ied] petitioner the judicial remedy he seeks or [provided] him with an equally effective substitute"). The pertinent question in determining the propriety of an additional *Bivens* remedy is rather whether "Congress has provided what it considers *adequate remedial mechanisms* for constitutional violations." *Chilicky*, 487 U.S. at 423 (emphasis added). Here the court of appeals found that only one small corner of the remedial field – a possible injunction ancillary to a state tort claim for intentional infliction

[13] It bears mention that respondent has vigorously pursued this avenue of relief: she filed FOIA requests with the respective agencies in January 1995 and acknowledges that "expedited processing was granted in light of the emergency situation." J.A. 34-35; *see also* Pet. App. 4a. Although she "received no documents of any kind in the following months," J.A. 35, since then she has filed two lawsuits in federal court to press her FOIA requests, and after receiving thousands of pages of documents containing the very information she had sought (as she now acknowledges, *see* Cert. Opp. 19 n.4), she has voluntarily dismissed both actions. *See Harbury v. CIA*, No. 95-CV-1431 (D.D.C. filed July 31, 1995; stipulation of dismissal filed Jan. 28, 1999); *Harbury v. Department of State, et al.*, No. 97-CV-305 (D.D.C. filed Feb. 14, 1997; stipulation of dismissal filed Jan. 28, 1999).

of emotional distress – might possibly be left uncovered in the absence of a *Bivens* remedy. *See* Pet. App. 24a-25a. Yet this is exactly the sort of judicial gap-filling that this Court has repeatedly explained is an inappropriate foundation for a *Bivens* action.[14]

A second "special factor counseling hesitation," *Bivens*, 403 U.S. at 396, is that allowing *Bivens* actions like this one to proceed would create a "potentially enormous financial burden for the Federal Government." *Meyer*, 510 U.S. at 486; *see also United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1947). Over the years, the Court has shown great reluctance to authorize any monetary recovery for misrepresentations made by government officials. Indeed, in reviewing rulings by the lower courts that have upheld claims of estoppel against the government, the Court has never failed to reverse, often summarily. *See, e.g.*, *INS v. Hibi*, 414 U.S. 5 (1973) (per curiam); *Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam); *INS v. Miranda*, 459 U.S. 14 (1982) (per curiam). And Congress has evinced the same concern in the FTCA, which "by its terms excludes both negligent and intentional misrepresentation claims from its coverage." *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 429-30 (1990) (citing 28 U.S.C. § 2680(h)). What the Court said there is equally germane here: "We would be most hesitant to create [a cause of action] that would nullify a congressional decision against authorization of the same class of claims." *Id.* at 430.

In the *Richmond* decision, the Court further clarified that any claim for money from the Public Treasury contrary to a statutory appropriation is prohibited by the Appropriations

[14] As the Court has pointed out in a related context: "The natural consequence of a rule that [imposed liability] for the statements of [government officials] would be a decision to cut back and impose strict controls on Government provision of information in order to limit liability. . . . The inevitable fact of occasional individual hardship cannot undermine the interest of the citizenry as a whole in the ready availability of Government information." *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 433-34 (1990).

Clause of the Constitution, Art. I, § 9, cl. 7. *See* 496 U.S. at 424-29. The Court quoted Judge Friendly's observation that it "ignores reality to expect that the Government will be able to 'secure perfect performance from its hundreds of thousands of employees scattered throughout the continent.'" *Id.* at 433 (quoting *Hansen v. Harris*, 619 F.2d 942, 954 (2d Cir. 1980) (Friendly, J., dissenting), *rev'd sub nom. Schweiker v. Hanson*, 450 U.S. 785 (1981)). The Court's conclusion on this point is particularly apt in the circumstances here as well:

> To open the door to [such] claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc. Even if most claims were rejected in the end, the burden of defending such . . . claims would itself be substantial.

Richmond, 496 U.S. at 433. Thus the Court again should "leave it to Congress to weigh the implications of such a significant expansion of Government liability." *Meyer*, 510 U.S. at 486.

A third and very significant "special factor" here is that respondent's suit would require judicial interference with the conduct of foreign affairs and covert quasi-military operations of extreme sensitivity. Indeed, the Court has indicated that the potential to "significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest" is a distinct special factor that counsels hesitation in creating a *Bivens* remedy. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990); *see also Chappell v. Wallace*, 462 U.S. 296, 303-04 (1983) (refusing to imply *Bivens* action because of "special status of the military" and "special nature of military life"); *United States v. Stanley*, 483 U.S. 669, 683 (1987) (refusing to imply *Bivens* action because "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate").

In this case, the allegations in respondent's *Bivens* action raise issues about whether the highest-ranking State Department and NSC officials may legitimately withhold information from her – even if necessary through deception – about their

knowledge concerning covert operations amidst a civil war in a foreign country. That is not the sort of question that should be lightly committed to resolution by the judicial branch.[15] Accordingly, the Court should conclude that respondent cannot assert a valid *Bivens* claim in the circumstances of this case.

II. THE COURT SHOULD UPHOLD THE DEFENSE OF QUALIFIED IMMUNITY HERE EVEN IF IT RECOGNIZES THIS CONSTITUTIONAL CLAIM FOR THE FIRST TIME IN THIS CASE.

The ruling below misapplies the doctrine of qualified immunity that the Court has extended to government officials. The constitutional issue raised here has never been addressed by the Court; has not been definitively determined by the lower courts; presents a hotly disputed question on the merits; and certainly had not been "clearly established" adversely to petitioners at the time they acted. In this posture, the Court's precedents uniformly uphold petitioners' defense of qualified immunity.

A. Qualified Immunity Shields Officials from Liability Where the Unlawfulness of Their Conduct Was Not Clear from Preexisting Law.

The Court's decisions have long settled that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). To defeat a defense of qualified immunity, the

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[15] It is also pertinent that one of the FOIA's carefully considered exemptions that justifies nondisclosure of information is where the requested document is classified "by an Executive order to be kept secret in the interests of national defense or foreign policy." *See* 5 U.S.C. § 552(b)(1).

constitutional right alleged to be violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," which requires that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640.

This doctrine serves to alleviate concern that the threat of personal liability for money damages would "'dampen the ardor of all but the most resolute or the most irresponsible'" public officials. *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950)). Shielding officials from lawsuits that may distract them from their governmental duties has been judged necessary and appropriate to "encourag[e] the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506 (1978); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

To this end, the Court has developed an objective test for determining whether the law existing at the time "clearly established" that such conduct was prohibited. First, the right at issue must be defined with reasonable particularity, which means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that, in the light of preexisting law, the unlawfulness must be apparent." *Id.*; *see also Saucier v. Katz*, 121 S. Ct. 2151, 2155-57 (2001) (alleged right must be formulated "on a more specific level"); *Wilson v. Layne*, 526 U.S. 603, 615 (1999). In making this determination, which is a pure question of law, a court should "use its 'full knowledge of its own [and other relevant] precedents,'" *Elder v. Holloway*, 510 U.S. 510, 516 (1994), and thus it is proper to look first to "the opinions of this Court, of the Courts of Appeals, or of the local District Court" that existed at the time of the challenged conduct. *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *see also Scherer*, 468 U.S. at 192 & n.9.

Above all, the Court has stressed that officials cannot "reasonably have been expected to be aware of a constitutional right that had not yet been declared." *Procunier*, 434 U.S. at 565. "Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell*, 472 U.S. at 535. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. For these reasons, "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. The importance of close adherence to these principles is manifest in an area where the Court has stressed that qualified immunity is an "*immunity from suit* rather than a mere defense to liability," which is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526 (emphasis in original).

The court of appeals did not correctly apply these governing principles. No controlling authority from this Court or from the court below even hinted that petitioners' conduct would violate respondent's constitutional right of access to the courts as of 1993 and 1994. Shortly before, the state of the law in other jurisdictions had been accurately described as "nebulous." *Crowder*, 884 F.2d at 811. And in the years since, the range of disagreement has increased rather than narrowed, a fact which itself compels a finding of qualified immunity. *See Mitchell*, 472 U.S. at 535; *Wilson*, 526 U.S. at 618.

The court of appeals committed two major errors that affected its decision. *First*, it failed to come to grips with lower court precedents from other jurisdictions that had rejected access-to-courts claims in similar circumstances. *See infra* Part II.B. *Second*, in trying to show that the law was "clearly established" in favor of respondent's access-to-courts claim, the court of appeals relied heavily on decisions that postdated the events in question. *See id.* That was wholly improper, since officials lose the shield of qualified immunity only when the unconstitutionality of their conduct would have been apparent

"in the light of pre-existing law." *Anderson*, 483 U.S. at 640; *see also Harlow*, 457 U.S. at 818; *Malley*, 475 U.S. at 341.

B. At the Time Petitioners Acted, the Lower Courts Had Not Settled the Due Process Issue.

In this case, respondent has not cited "any cases of controlling authority in [her] jurisdiction at the time of the incident which clearly established the rule on which [she seeks] to rely." *Wilson*, 526 U.S. at 617. Accordingly, petitioners are entitled to qualified immunity unless respondent can identify "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Id.* No such consensus has ever existed on the due process issue raised in this case.

At the time petitioners acted, in 1993 and 1994, the scanty case law in the lower courts had not definitively resolved the constitutional issues raised in this case – and none of those cases had considered these issues in the unusual circumstances presented here. The panel decision below (and the panel's further explication when it denied rehearing) cite a total of seven circuit court decisions that have addressed some version of the constitutional question presented here, a majority of which did not even find a constitutional violation. *See* Pet. App. 21a-22a; *see also id.* at 66a-67a. Only four of those decisions were issued prior to the actions at issue in this case, and not only are they readily distinguishable, but they simply cannot be said to constitute a clear "consensus of cases of persuasive authority such that a reasonable officer *could not have believed* that his actions were lawful" in the circumstances of this case. *Wilson*, 526 U.S. at 617 (emphasis added).

In *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), the court upheld a right-of-access claim, among other claims of conspiracy to violate civil rights, but expressly limited its holding "to the particularly egregious set of facts herein," in which one of the police officers was convicted of homicide, several officers confessed to having committed perjury and obstruction of justice, and much of their criminal misconduct was specifically found to have been motivated by racial

discrimination. *Id.* at 1264-65; *see also id.* at 1214-22. Likewise, in *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986), the court found a constitutional violation where defendants allegedly suborned perjury and obstructed discovery, conduct that itself "was also a crime." *Id.* at 573. Even for such egregious conduct, however, the court also noted that "the alleged conduct *wholly* deprived the estate of its causes of action against federal defendants" and thus "cannot be termed a mere alteration of remedies or forms of recovery," but constituted an absolute denial of access to vindicate the plaintiff's rights. *Id.* at 578 (emphasis added).

The facts of these two cases, along with the express judicial caveats about how to conceptualize and apply the alleged right of access, place these decisions at a considerable distance from the instant case. Here petitioners are not even alleged to have committed any crime or to have engaged in nefarious conduct, there are obvious and weighty justifications for their conduct even if it were as alleged, and it is plain that their alleged actions have *not* deprived respondent of all avenues of administrative and judicial relief. Certainly it cannot be maintained that the courts in those cases upheld constitutional violations "under facts not distinguishable in a fair way from the facts presented in the case at hand." *Saucier*, 121 S. Ct. at 2157.

The other two cases, both from the Fifth Circuit, further illustrate the lack of uniformity among the lower courts on the constitutional issue at the time of petitioners' alleged actions. In *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), the court stated that interference with access to the courts "may by itself amount to a constitutional deprivation (unless reasonably justified by a countervailing state interest)." *Id.* at 975. But the court did not examine in any detail the kinds of situations in which this would be so, or in which officials would be judged to have presented an adequate countervailing justification for their conduct. Moreover, the court explicitly noted that defendants may be entitled to qualified immunity against such a claim. *See id.* at 975-76. To the extent that *Ryland* is offered as having firmly established the Fifth Circuit's position in support of the constitutional violation alleged in *this* case, however, that ruling

was directly undermined by *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989). The *Crowder* court held that no constitutional deprivation had occurred because the right of access is merely "a facilitative right" and thus could not be invoked where the complaining parties "had 'access' to the Texas courts" at all times. *Id.* at 814. Indeed, the court commented that "the current contours of the right can best be described as nebulous," *id.* at 811, and framed the alleged right of access quite narrowly, in terms of wrongful and intentional concealment of crucial information solely "for the purpose of frustrating that right," *id.* at 812. The court also specifically held that any such right of access does *not* "guarantee one the right to have one's case proceed in a particular procedural posture or the right to a particular form of relief." *Id.* at 814. Far from firmly establishing the right of access as formulated by the court below, these distinctions directly undermine that formulation.

Moreover, in a later decision the Fifth Circuit upheld qualified immunity against an access-to-courts claim in a decision issued just after the events of this case. *See Foster v. City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1994). The court "question[ed] *Bell*'s reliance on *Ryland* for any broader definition of [the] right of access," and framed the right in terms of an ability "to institute suit," thus reaffirming the exhaustion requirement. *Id.* at 430 n.7. Indeed, it is telling that a recent district court case from the Fifth Circuit construed *Foster* as having "clarified that if Plaintiff is able to file suit, the right is simply not implicated," and explicitly criticized the ruling below *in this very case* as "giving the right of access to courts a broader definition than that recognized in this circuit." *Ellis v. Magee & Devereux*, 2001 WL 167744, at *2 & n.3 (E.D. La. Feb. 15, 2001). Although these subsequent decisions do not directly show what the law was at the time of the events in question, they do demonstrate that the Fifth Circuit's prior decisions cannot properly be read as endorsing the more expansive due process holding rendered by the court below.

In response to the dissenting judges' criticism of the circuit court cases that were cited in opposition to qualified immunity, *see* Pet. App. 70a-71a, the panel relied, erroneously, on other

decisions that *postdated* the events in question. Three of the cases cited, *see* Pet. App. 66a-67a, were not even issued until *after* the events at issue here had occurred.

The use of subsequent decisions to invalidate petitioners' defense of qualified immunity was plainly improper, as the Court's precedents make clear. In *Mitchell*, for example, federal officials were alleged to have wrongfully authorized a wiretap on the plaintiff's telephone. Two years after those actions had taken place, the Supreme Court had ruled that such conduct was unlawful and violated the Fourth Amendment. *See United States v. United States Dist. Ct.*, 407 U.S. 297 (1972). At the time of the acts at issue, however, the law was not clearly established on this point. *See Mitchell*, 472 U.S. at 533. The Court thus upheld the claim of qualified immunity, stating that "officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted," for this "hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Id.* at 535. "The decisive fact," the Court wrote, "is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted," as shown by the fact that the Court itself intervened to decide the issue two years later. *Id.*

Moreover, even on their own terms, these later circuit court decisions only serve to undermine the notion that the law has ever been "clearly established" along anything like the lines stated by the court below. In particular, both the Sixth Circuit's 1997 decision in *Sweckel* and the Ninth Circuit's 1998 decision in *Delew* ordered dismissal of right-of-access claims because both courts held that any such claim incorporates a strict "exhaustion" requirement. *See Swekel*, 119 F.3d at 1264 (even "reprehensible" actions by government officials to cover up evidence in order to ward off a lawsuit, which "substantially prejudice [her] ability to recover in state court," do not amount to a constitutional violation unless she can "show *absolute denial* from state court") (emphasis added); *Delew*, 143 F.3d at 1223 (claim can proceed only "if in fact the defendants' alleged cover-up actually rendered *all* state court remedies ineffective") (emphasis added). Accordingly, both of these courts hold that

a plaintiff *must* "make some attempt to gain access to the courts" *before* "filing an 'access to courts' claim." *Swekel*, 119 F.3d at 1264; *see Delew*, 143 F.3d at 1222-23. In sharp contrast, as described in Part I.B, *supra*, the court below parted company with its sister circuits on this key point, which was dispositive of the claims in both cases. These later cases not only fail to support the court of appeals' *rejection* of qualified immunity, but they reflect just the kind of discord among the lower courts that *compels* a finding of qualified immunity. *Wilson*, 526 U.S. at 618 ("If judges thus disagree on a constitutional question, it is unfair to subject [public officials] to money damages for picking the losing side of the controversy.").

The final case cited in the ruling below was *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995), which casts additional doubt on respondent's position on qualified immunity. In that case, the court also denied the proffered right-of-access claim, notwithstanding that defendants had engaged in "inexcusable" conduct intended solely to cover up wrongdoing, because "the cover-up failed to achieve such ends." *Id.* at 329. The Seventh Circuit also went out of its way expressly to underscore that its holding in *Bell* "was motivated in particular by the egregiousness of the police conduct in that case" and thus should not be read broadly. *Id.* Once again, therefore, these developing trends in the lower courts tend to weaken, rather than strengthen, any argument against qualified immunity here.

In sum, the Court has emphasized that public officials "cannot be expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at 562. The Court has steadfastly reaffirmed this admonition, noting that "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam summary reversal) (quoting *Malley*, 475 U.S. at 343, 341). The "nebulous" state of the law in the lower courts on the right-of-access issue, *Crowder*, 884 F.2d at 811, amply supports petitioners' defense of qualified immunity here.

C. Respondent's Alleged Right-of-Access Claim Is Not Clearly Established Even Today.

It is, at a minimum, very far from obvious even now that petitioners' conduct violated any clearly established constitutional rights. The most direct indication of this uncertainty is the Court's decision to grant *certiorari* and decide the constitutional issue in this case, which had spawned conflicting decisions in the courts below. *See Mitchell*, 472 U.S. at 534 (finding it significant for purposes of qualified immunity that "this Court found the issue sufficiently doubtful to warrant the exercise of its discretionary jurisdiction" to decide it and give it "the definitive answer that it demanded"). And Part I, *supra*, discusses in detail all the reasons why respondent's claims are not actionable in the first instance. Certainly "the constitutional question presented by this case is by no means open and shut." *Wilson*, 526 U.S. at 615.

In fact, the lower courts are still divided on the underlying constitutional issue, eight years after the events that gave rise to this case. The district court noted that the lower courts disagree on the constitutional merits (*see id.* at 46a & n.2), which were also disputed within the *en banc* court below, *see id.* at 70a-71a (Henderson & Sentelle, JJ., dissenting from denial of rehearing *en banc*). All of this division and uncertainty more than suffice to justify petitioners' defense of qualified immunity here. *See, e.g., Wilson*, 526 U.S. at 618; *Procunier*, 434 U.S. at 562.

The doctrine of qualified immunity is designed to allow public officials to carry out their duties with "the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974); *see also Wood v. Strickland*, 420 U.S. 308, 321 (1975) (qualified immunity ensures that public officials "need not exercise their discretion with undue timidity"). Only by faithful application of these settled principles can government officials "reasonably anticipate when their conduct may give rise to liability for damages" and tailor their behavior accordingly. *Scherer*, 468 U.S. at 195. The Court has consistently held that officials cannot be held personally liable in damages where they simply make wrong guesses in gray areas

of the law, rather than transgressing bright lines, for qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

In the circumstances of this case, petitioners cannot plausibly be placed in either category. That is especially true in view of the sensitive subject matter implicated here, which touched on delicate matters of relations with a foreign government and intervention in its quasi-military affairs. In this context, in particular, the district court found itself unable to conclude that petitioners "would have reasonably known that they [had to] be forthcoming in discussing the intelligence that they had received about Bamaca." Pet. App. 48a. That decision is undoubtedly correct, and therefore petitioners are entitled to qualified immunity here.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the case remanded with instructions to dismiss the remaining *Bivens* claim brought against petitioners.

Respectfully submitted,

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